COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

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Re: *S. Layton Ayers, et al. v. Pave It, LLC, et al.*,
Civil Action No. 01812-S

Dear Counsel:

Petitioners/Intervenors Thomas E. Pettyjohn and Whitney Poquist, as co-executors of the Estate of Norman E. Hastings (collectively, the "Hastings Estate"), seek a declaratory judgment that their easement across the land owned by Respondent Pave It, LLC has not been extinguished. Pave It claims that the easement has been extinguished through adverse possession. This issue formed the basis for a one day trial held November 3, 2005. This letter opinion embodies the Court's post-trial findings of fact and conclusions of law. For the reasons stated, the Court concludes that Pave It has not met its burden of proving adverse possession, and therefore the Hastings Estate's easement remains in effect.

I. PROCEDURAL HISTORY

This long-pending case began as a quiet title and declaratory judgment action brought by Petitioners S. Layton Ayers and Elizabeth Starr Ayers (the "Ayers") against Donald A. Kary and Anna May Kary (the "Karys"). On October 1, 1997, Norman E. Hastings moved to intervene. On May 10, 2004, after several years of inactivity and the death of Hastings, the Hastings Estate was substituted for Hastings and Pave It was substituted for the Karys.[1] The Ayers subsequently entered into a stipulation with Pave It confirming that the Ayers have acquired a nonexclusive easement through adverse possession from Pave It that is of more limited scope than the easement remaining at issue.[2] Accordingly, the only remaining parties to this dispute are the Hastings Estate and Pave It.

II. FACTS

Both the Hastings Estate and Pave It own land formerly owned by Howard F. Lane and Flossie Lane (the "Lanes").[3] The Lanes' land was west of U.S. Route 13 and contained 450 feet of frontage on that road. In 1957, the Lanes divided their property and sold approximately 8.5 acres fronting on Route 13 to Lucien T. Jones and Ruth C. Jones

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1 Stip. of Substitution (May 10, 2004) ¶¶ 2–3.

2 Pretrial Stip. ¶ 2(f). The easement the Ayers acquired pertains to the first 152 feet from U.S. Route 13 of the easement in dispute between the Hastings Estate and Pave It, which extends for a much longer distance. *Id.*

3 Pretrial Stip. ¶ 2(c).

(the "Jones").[4] In the deed conveying that parcel to the Jones, the Lanes reserved an express easement, 50 feet wide by 1034 feet long, to access the land they retained west of the Jones' property.[5]

In 1968, the Jones divided their property and sold the northern portion to Everett T. Conaway and the southern portion to Lloyd W. Hudson and his partners (collectively, "Hudson"), the owners of Delmarva Paving Inc.[6] The easement lies on the northernmost portion of the Hudson property and does not burden the Conaway property.[7] Hudson's deed does not refer to the express easement that the Lanes reserved in 1957.[8]

In 1985, the Karys purchased the Hudson property.[9] The Karys then conveyed the property to Pave It.[10] The Ayers purchased the land formerly owned by Conaway.[11] In

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4 PX 1.

5 *Id.*

6 PX 2; DX 14; Hudson Dep. at 4.

7 Pretrial Stip. ¶ 2(e).

8 DX 14.

9 Pretrial Stip. ¶ 2(c).

10 Tr. at 240 (Kary). Citations in this form ("Tr.") are to the trial transcript and indicate the page, and where it is not clear from the text, the witness testifying. *See also* Pretrial Stip. ¶¶ 2(b)–(c). Steven Kary currently owns Pave It. Tr. at 239 (Kary).

11 PX 2–7.

1963, the Lanes conveyed the property west of the Pave It property to Margaret Hastings, the spouse of Norman Hastings.[12] That deed did not refer to an easement.[13]

Thus, Pave It currently owns land situated west of U.S. Route 13 with 250 feet of frontage on that road.[14] The Hastings Estate owns the land west of Pave It's land.[15] The easement contained in the original deed from the Lanes to the Jones is 50 feet wide and runs along the northernmost portion of Pave It's property.[16] The parties have stipulated that an easement existed and that any adverse possession of it was interrupted no later than Hastings's service of his motion to intervene on October 1, 1997.[17]

Pave It contends that it has extinguished the easement through adverse possession. Specifically, Pave It claims that it has prohibited the Hastings Estate from using the easement for its intended purpose by 1) storing piles of rock in the easement, 2) parking large tankers in the easement, and 3) allowing a fence to block the easement.[18] Pave It contends these obstructions have blocked the easement for the 20 year statutory period.[19]

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12 Pretrial Stip. ¶ 2(c).

13 PX 9.

14 Pretrial Stip. ¶ 2(b).

15 *Id*. ¶ 2(a).

16 *Id*. ¶¶ 2(d)–(e).

17 *Id*. ¶ 2(g).

18 Resp't's Opening Post-Trial Br. ("ROB") at 5–7.

19 *Id*. *See* 10 *Del. C.* §§ 7901–7904.

The Hastings Estate admits that it has not used the easement recently.[20] It argues, however, that Pave It has not prevented the use of the easement for the required period.[21] The Hastings Estate further claims that it used the easement during the statutory period.[22]

III. ANALYSIS

A. Legal Standard

Nonuse of an express easement will not, by itself, extinguish that easement.[23] Express easements can be extinguished, however, by adverse possession.[24] The elements of adverse possession are well-settled: the claimant must show that it "openly, exclusively, notoriously, continuously and adversely" possessed the disputed easement for 20 years.[25] "'Open and notorious' mean[s] that the possession must be public so that

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20 Pet'r's Post-Trial Reply Br. ("PRB") at 2.

21 Pretrial Stip. ¶ 3.

22 Tr. at 45–47 (Ronald Hastings).

23 *Wolfman v. Jablonski*, 99 A.2d 494, 496 (Del. Ch. Sept. 25, 1953); *see also Pencader Assocs., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1100 (Del. 1982) ("An easement-of-necessity cannot be terminated by mere non-use."); *Stozenski v. Borough of Forty Fort*, 317 A.2d 602, 605 (Pa. 1974) ("Nonuse, no matter for what duration of time, will not extinguish an easement.").

24 *Pencader*, 446 A.2d at 1100.

25 *Acierno v. Goldstein*, 2004 Del. Ch. LEXIS 82, at *23 (Del. Ch. June 29, 2004).

the owner and others have notice of the possession."[26] A hostile claim goes "against the claim of ownership of all others, including the record owner."[27]

Delaware's adverse possession statute, 10 *Del. C.* §§ 7901–7904, does not prescribe a standard of proof. On several occasions, this court has indicated that the standard is, or may be, clear and convincing evidence.[28] The majority of other states have adopted the clear and convincing standard.[29] And, Delaware law requires proof of an easement by prescription by clear and convincing evidence.[30] Clear precedent of the Delaware Supreme Court and subsequent Court of Chancery cases, however, require application of the preponderance of the evidence standard to adverse possession cases.[31] Although it might seem incongruous to require proof of a prescriptive easement by clear

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[26] *Mitchell v. Dorman*, 2004 Del. Ch. LEXIS 6, at *7–8 (Del. Ch. Jan. 16, 2004) (quoting *Stellar v. David*, 257 A.2d 391, 394–95 (Del. Ch. 1969), *rev'd on other grounds*, 269 A.2d 203 (Del. 1970)).

[27] *Id.*

[28] *See, e.g, Lowry v. Wright*, C.A. No. 20185, slip op. at 5 (Del. Ch. June 5, 2006); *Acierno v. Goldstein*, 2005 Del. Ch. LEXIS 176, at *7 (Del. Ch. Nov. 16, 2005); *Johnson v. Bell*, 2003 Del. Ch. LEXIS 139, at *7 (Del. Ch. Dec. 11, 2003); *Miller v. Steele*, 2003 Del. Ch. LEXIS 39, at *5 (Del. Ch. Apr. 11, 2003).

[29] *See Brown v. Gobble*, 474 S.E.2d 489, 494 (W. Va. 1996) (citing cases).

[30] *Lickle v. Diver, Inc.*, 238 A.2d 326, 329 (Del. 1968); *Cartanza v. LeBeau*, 2006 Del. Ch. LEXIS 63, at *9 (Del. Ch. Apr. 3, 2006).

[31] *Phillips v. State ex. rel. Dep't of Natural Res.*, 449 A.2d 250, 255 (Del. 1982); *Dickerson v. Simpson*, 792 A.2d 188 (Del. 2002); *Edwards v. Estate of Muller*, 1993 Del. Ch. LEXIS 238, at *43 (Del. Ch. Oct. 18, 1993); *Cox v. Lakshman*, 1989 Del. Ch. LEXIS 35, at *4–5 (Del. Ch. Apr. 13, 1989).

and convincing evidence while only requiring proof by a preponderance of the evidence to work a forfeiture of title, *Phillips v. State* remains controlling Delaware law. As such, this Court will apply the preponderance of the evidence standard to Pave It's claim that it extinguished the Hastings Estate's easement by adverse possession.

The servient estate cannot extinguish an easement through use.[32] The servient estate has the right to use the property subject to the easement so long as the dominant estate can use and enjoy the easement, as well.[33] Only when the servient estate prevents the dominant estate's use of an easement does possession by the servient estate become adverse.[34]

Pave It has proven that the obstructions placed in the easement were open and notorious. The obstructions were visible to the public and to Petitioners. This is enough to have put Petitioners on notice that Pave It was using the easement. The Court, therefore, turns to the remaining elements of adverse possession.

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[32] *Vandeleigh Indus., LLC v. Storage Partners of Kirkwood, LLC*, 2006 WL 1519600, at *5 (Del. 2006) ("Generally speaking, the owners of a servient estate burdened by an easement in favor of a dominant estate may use the premises as they choose, but may not interfere with the proper and reasonable use by the owner of the dominant estate of their dominant right.") (internal quotation omitted); *see also Yeomans v. Head*, 253 S.E.2d 746, 747 (Ga. 1979); *see also* 4-34 POWELL ON REAL PROPERTY § 34.21(1) (2006).

[33] *Vandeleigh Indus.*, 2006 WL 1519600, at *5; *see also Folk v. Meyerhardt Lodge*, 127 S.E.2d 298, 300 (Ga. 1962); *see also* 4-34 POWELL ON REAL PROPERTY § 34.21(1) (2006).

[34] *See Stozenski*, 317 A.2d at 605; *see also* Restatement (Third) of Property § 7.7 (2000).

B. The Placement of the Tankers Was Not Hostile to the Hastings Estate

In order to make a successful adverse possession claim, the claimant must show adverse or hostile possession. In the context of easements, adverse or hostile means "acts which are inconsistent with one's right to pass across the land whenever the necessity to do so arises."[35]

Pave It's asphalt tankers would be adverse or hostile if they effectively blocked the entire right-of-way and prevented the Hastings Estate from accessing Route 13.[36] The way they were situated, however, the Hastings Estate could still use the easement. While the tankers were and are parked perpendicular to the easement, they only extend 25 to 26 feet into it.[37] Further, the tankers are not staggered, but instead, neatly parked next to each other on one side of the easement.[38] Because the easement is 50 feet wide, there remains approximately 25 feet in which to travel. Twenty-five feet is more than sufficient to allow for a car to pass; thus, the Hastings Estate could use the easement for its intended purpose notwithstanding the presence of the tankers. Therefore, Pave It has not shown hostile possession of the easement through their tankers.

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35 *Stozenski*, 317 A.2d at 605.

36 *See id.*

37 Letter to the Court (Mar. 30, 2006).

38 DX 6.

Even if the tankers constituted hostile possession, Pave It failed to prove that they blocked the easement for the required period. Hudson testified that he parked the tankers on the property in 1968.[39] Hudson and Kary testified that they did not move the tankers when they owned the property,[40] but Hudson could not say that all of the tankers are currently in the same position as he originally placed them.[41]

Additionally, Samuel Topper, a Service Forester for the Delaware Department of Agriculture, opined that the tankers were parked in the easement after trees surrounding the tankers had begun growing.[42] He based his conclusion on the location and nature of the damage done to the trees and the fact that some of the trees were embedded in the tankers.[43] Upon examination of the trees in 2005, Topper estimated the age of the trees at approximately 14 years and no older than 17 years.[44] Thus, the Court cannot conclude that the tankers blocked the easement for the statutory period if, indeed, they ever did.

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39 Hudson Dep. at 101.

40 *Id.*; Tr. at 247 (Kary).

41 Hudson Dep. at 101.

42 Tr. at 121 (Topper).

43 Tr. at 117–18, 121; PX 31-2, 31-3, 31-6, 31-10.

44 Tr. at 113, 124.

C. Pave It Has Not Proven That the Fence Was Stationary

Pave It alleges that Lloyd Hudson erected a fence on Pave It's property in the early 1970's.[45] Further, Pave It claims that the fence has always extended to the northernmost edge of Pave It's property and blocked the easement.[46] Before installing the fence, Hudson installed a light post.[47] There is no dispute that the light post has always been close to the northern edge of Pave It's property and that in recent years the fence has enclosed the light post.[48]

One way to determine whether the fence always extended to the edge of the easement is to determine whether the light post always was inside the fence. If the light post was inside the fence, then it would be reasonable to infer that the fence completely blocked the easement. If the fence initially did not enclose the light post, the fence might not have blocked use of the easement for the full statutory period. Although today the light post is situated inside the fence, there is conflicting evidence whether it has always been so situated.

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45 Hudson Dep. at 15, 40.

46 ROB at 6–7.

47 Hudson Dep. at 15.

48 Tr. at 218 (Chaffinch); *see also* Tr. at 14–15 (Ayers).

Hudson testified that the light post was *outside the fence* when the fence was installed.[49] When asked to indicate the initial location of the fence on an early aerial photograph, Hudson showed the fenced in area being a significant distance away from the light post.[50] Additionally, Timothy Ayers, owner of the parcel bordering Pave It to the north, stated that there were no obstructions in the easement in the mid-1980's.[51]

There is also evidence in the record that, before his passing, Norman Hastings drove his vehicle across the easement during the statutory period.[52] Further, at the behest of Norman Hastings's son Ronald, Dwight Lingham cleaned the easement in 1980 or 1981 to facilitate vehicular access.[53] While cleaning the easement, Lingham could see a fence, but was able to walk through the easement between the fence and a ditch that ran

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49 Hudson Dep. at 20.

50 Tr. at 19–21; *see also* DX 4. In its Post-Trial Reply Brief, Pave It argued that Hudson did not accurately draw where the fence was originally erected. Specifically, it points to the fact that Hudson indicated he was unsure exactly where the fence was on the photograph. Resp't's Post-Trial Reply Br. at 2. I find this argument unconvincing because Hudson unequivocally testified that the light post was outside the fence when it was initially erected.

51 Tr. at 13–14 (Ayers).

52 Tr. at 44–45 (Ronald Hastings).

53 Tr. at 139–40, 143 (Lingham).

along and just above the northern border of the Pave It property.[54] During a recent visit, Lingham could not enter the easement because the fence blocked his path.[55]

Finally, Derik Callaway, a photogrammetrist,[56] did not see a fence on the northern boundary of Pave It's property in a 1977 aerial photograph he analyzed.[57] He did see vehicular pathways in the easement in that photograph.[58] In a 1989 aerial photograph, however, Callaway saw a fence and vehicles parked in the easement.[59] Based on these observations, Callaway opined that the easement became blocked sometime between 1977 and 1989.[60] In order to have blocked the easement for the statutory period, the fence must have run across the width of the easement from 1977 to 1997. Based on a careful review of the conflicting evidence, the Court concludes that Pave It has not met

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54 Tr. at 142–43; Tr. at 19 (Ayers). The Court reasonably can infer from Lingham's testimony that there were at least 25–30 feet between the ditch and the fence. *See* Tr. at 149–50.

55 Tr. at 144–45.

56 A photogrammetrist is "one who views aerial imagery and makes determinations of what is located on the ground from what you view. It's an identification of points from an aerial image." Tr. at 81 (Callaway). Callaway uses a special instrument known as a stereogram to view aerial photographs. Tr. at 83. Callaway has been a practicing photogrammetrist for nine years, but is not certified by the American Society of Photogrammetry and Remote Sensing. Tr. at 89, 99.

57 Tr. at 93.

58 Tr. at 93

59 Tr. at 95

60 Tr. at 95.

its burden of proof on this issue by a preponderance of the evidence. In that regard, the Court found the testimony of the witnesses cited above to be credible.

D. The Rock Piles Do Not Constitute Adverse Possession

Pave It's claim that rock piles on its property blocked travel through the easement fails to prove adverse possession. There is no evidence in the record as to the size of the rock piles. Like the tankers, the rock piles may have blocked portions of the easement but still left enough room for travel. Without more evidence, the Court cannot find hostile possession based on the rock piles. Furthermore, even if the rock piles completely blocked use of the easement, there is no evidence as to how long the piles were in the easement. Therefore, Pave It failed to prove that the rock piles themselves blocked use of the easement for the statutory period or that they did so in conjunction with some other obstruction.

E. Exclusivity

Lastly, Pave It must show that any possession that it had over the easement was exclusive. Essentially, Pave It must prove that it and its predecessors were the only ones to use the easement for the statutory period.[61] The evidence shows the contrary: to wit, that Pave It did not exclusively possess the easement for the statutory period.

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[61] *Acierno*, 2004 Del. Ch. LEXIS 82, at *23.

Ronald Hastings testified that his father drove his jeep across the easement to access a local fire hall in the early 1980's.[62] In addition, Hudson remembered people cutting across the easement to cut pulp wood.[63] He never objected when the easement was used.[64] Thus, Pave It's use of the easement was not exclusive.

IV. THE HASTINGS ESTATE'S ATTORNEYS' FEES

In Delaware, "parties bear their own attorneys' fees pursuant to the American Rule."[65] Although exceptions to this rule exist in equity, including for bad faith conduct in litigation, the Hastings Estate has not shown that any such exception applies here.

V. CONCLUSION

Pave It has not met its evidentiary burden for proving extinguishment of the easement by adverse possession. Specifically, Pave It has not shown hostile possession through its tankers or rock piles or that the tankers, the fence and the rock piles obstructed the easement for 20 years. Furthermore, the Hastings Estate has shown that it used the easement during the statutory period and Pave It's possession was not exclusive. Therefore, the Court finds that Pave It has not adversely possessed the easement. Accordingly, the Hastings Estate has proved its entitlement to a declaratory judgment to

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62 Tr. at 45–46.

63 Hudson Dep. at 31–33.

64 *Id.*

65 *Carlson v. Hallinan*, 2006 WL 771722, at *22 (Del. Ch. Mar. 21, 2006) (internal citations omitted).

that effect. Pave It's claim for declaratory relief to the contrary is denied. Pave It shall remove any fencing or equipment from the easement so as to allow the Hastings Estate free and unimpeded use of the same. Counsel for the Petitioners shall submit a proposed form of order, on notice, within ten days.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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